

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

POPPI METAXAS,
Plaintiff,
v.
KENNETH LEE, et al.,
Defendants.

Case No. [19-cv-03819-EMC](#)

**ORDER GRANTING DEFENDANTS'
MOTION TO DISMISS**

Docket No. 57

I. INTRODUCTION

Plaintiff Poppi Metaxas brought this action under the Racketeer Influenced and Corrupt Organizations Act of 1970 (“RICO”) against nine defendants (“Defendants”), all employees or former employees of the community bank she once ran as CEO. Ms. Metaxas alleges that Defendants have “denied her claim for retirement benefits as part of a long-running criminal scheme to inflate the bank’s assets with funds set aside for her retirement plan.” Docket No. 48 (“Order”) at 1. In June 2020, Ms. Metaxas filed a Corrected First Amended Complaint (“FAC”) after this Court granted Defendants’ motion to dismiss her original complaint for failing to state a claim for relief. Defendants now move to dismiss the FAC on the same grounds. For the following reasons, the Court **GRANTS** Defendants’ motion and does so with prejudice.

II. BACKGROUND

A. Factual Background

The facts of this case were originally stated in the Court’s order of May 20, 2020, granting Defendants’ motion to dismiss Ms. Metaxas’s original complaint. *See* Order at 2-4. Gateway is a small, federally chartered bank based in northern California. FAC ¶ 1. Ms. Metaxas was

Gateway's CEO from 1995 until her resignation in May 2010. *Id.* ¶¶ 1, 66. In 2004, Gateway gave Ms. Metaxas a \$290,000 raise but the money was not paid to her directly. *Id.* ¶ 2. Instead, Gateway used it to pay the premiums for a \$5 million life insurance policy, which was to fund "a customized supplemental executive retirement plan" ("SERP") for Ms. Metaxas. *Id.* Under the SERP, Ms. Metaxas would become eligible for retirement benefits shortly after her retirement or her sixtieth birthday, whichever occurred later. *Id.* Exs. A & B. If Ms. Metaxas resigned voluntarily she would be entitled to all benefits that had already accrued, but if she was fired for cause she would not be entitled to any benefits. *Id.* Ex. A at 4–5.

Then came the financial crisis. By late 2008, a federal regulatory agency, the Office of Thrift Supervision ("OTS"), had instructed Gateway "to increase its capital position to provide coverage for potential losses from increasing levels of troubled assets." *Id.* ¶ 4. Gateway's Board was also directing the bank's executives to raise capital and sell troubled assets. *Id.*

It was at this point that trouble began for Ms. Metaxas and Gateway. Ms. Metaxas and Gateway's Vice President, Michael Kenny, orchestrated a transaction in which Gateway loaned its largest customer, Ideal Mortgage, \$3.65 million. *Id.* ¶ 54; Defendant's RJN (Docket No. 57-2), Ex. B, Tr. of Pleading at 18–21. That money came straight back to Gateway, as the down payment on certain troubled assets that federal regulators wanted off the bank's books. *Id.* Although the transactions were intended to "make Gateway's books look more acceptable to regulators," Ms. Metaxas would later admit that, "[t]aken together, [they] did not actually improve the condition of the bank." *Id.* OTS was not fooled in any event, and the so-called Round-Trip Transaction led to greater regulatory scrutiny. FAC ¶ 6. In April 2009, OTS issued a cease-and-desist order, which among other things directed Gateway to "maintain certain minimum regulatory capital ratios." *Id.* ¶ 4.

According to the FAC, the cease-and-desist order was the catalyst for a plot to fraudulently deprive Ms. Metaxas of her SERP benefits. The scheme began on April 20, 2010, when defendants Tim Green, Lawrence Fentriss, and Lawrence Wang, along with James Baxter,¹

¹ Baxter was a director of Gateway until his death in 2014. FAC ¶ 28. Green, Fentriss, and Wang are former officers and directors of the bank. *Id.* ¶¶ 19, 20, 27.

1 illegally “eliminated GATEWAY’s SERP PLAN liability” to Ms. Metaxas to meet the minimum
 2 net capital requirements mandated by the cease-and-desist order. *Id.* ¶ 7(b), 78. (Defendants,
 3 however, argue that this liability was never “eliminated” because it was always part of the bank’s
 4 general assets, and never specifically set aside for the SERP; *see infra* re: predicate act of
 5 abstraction.) Appropriating the funds allowed Green, Fentriss, Wang and various other defendant
 6 officers and directors of Gateway to fraudulently report to the FDIC and OTS (later the Office of
 7 the Comptroller of the Currency (“OCC”)) that Gateway had approximately \$1.24 million more in
 8 assets than it actually did. *Id.* ¶ 7(b), 78-80. That in turn helped Gateway meet the net capital
 9 requirements imposed by OTS/OCC and avoid the regulatory consequences (*e.g.*, higher deposit
 10 insurance premiums) that would otherwise have followed. *Id.* Gateway’s false reporting to the
 11 regulatory agencies allegedly continues to the present day. *See, e.g., id.* ¶ 7(b)-(c).

12 The next step in the scheme was to deny Ms. Metaxas her SERP benefits. Ms. Metaxas
 13 had begun receiving cancer treatments in 2008, went on sick leave in March 2010, and submitted
 14 her resignation to the Board of Directors on May 26, 2010. *Id.* ¶ 3. The Board accepted Ms.
 15 Metaxas’s resignation the next day. *Id.* ¶ 66. On March 25, 2013, a few weeks before her sixtieth
 16 birthday, Ms. Metaxas submitted her claim for SERP benefits. *Id.* ¶¶ 69–70. Her claim was
 17 denied on February 25, 2016 by a SERP Administrative Committee composed of Defendants
 18 Kenneth Lee and James Joseph Keefe, and Oakland Branch Manager Frances Baker. *Id.* ¶ 99.
 19 Ms. Metaxas alleges that the basis for the denial was fraudulent because, *e.g.*, the committee stated
 20 that she was not disabled when she ended her employment with Gateway, was not owed the
 21 benefits that had accrued as of her resignation, and had not performed at a level meriting SERP
 22 benefits. *Id.* Ms. Metaxas appealed the denial of her claim. *Id.* ¶ 100. An appeals committee
 23 composed of defendants Dale McKinney, Colin Madden, and Vinod Thukral then denied her
 24 appeal, again based on allegedly false statements. *Id.* In denying Ms. Metaxas’s request for
 25 benefits, the committee explained that “[Metaxas] did not qualify for SERP benefits because
 26 ‘ample evidence shows Ms. Metaxas’s willful and intentional violation of banking laws, most
 27 notably her own guilty plea,’ warranted termination for cause such that [Metaxas] was not entitled
 28 to benefits pursuant to Section 3.4 of the SERP.” Docket No. 57 (“Mot.”) at 5; *see also id.* at 2-3

(describing SERP provisions that allowed the bank to discontinue participation in the plan).

The final step in the scheme was lying to law enforcement to hide the wrongful elimination of Gateway’s liability to Ms. Metaxas and the ensuing false statements to federal regulators. By June 2011, law enforcement was investigating the Round-Trip Transaction. FAC ¶ 89. Ms. Metaxas alleges that various defendants made false statements in interviews with the FBI and the U.S. Attorney’s Office and in affidavits filed with a United States district court. *Id.* ¶ 10. These false statements fell into two categories: exaggerations of the damages Gateway suffered because of Ms. Metaxas’s conduct, and false claims that Ms. Metaxas was fired (or knew she was going to be fired). *See, e.g., id.* ¶¶ 10, 73.

Ms. Metaxas eventually pled guilty to one count of conspiracy to commit bank fraud in the Eastern District of New York in April 2015. *Id.* ¶ 73. At her plea hearing, Ms. Metaxas admitted that she helped arrange the Round-Trip Transaction and that she “did not provide the complete information about th[is] transaction[] to Gateway’s board.” Docket No. 57-2 (“Defendants’ RJN”), Ex. B, Tr. of Pleading at 18–19. Ms. Metaxas further acknowledged that she “knew it was against the law to commit a fraudulent scheme like this.” *Id.* at 22. Ms. Metaxas later filed a petition “to overturn her guilty plea and conviction . . . on grounds of ineffective assistance of counsel”; the petition was denied earlier this year and is currently on appeal. FAC ¶ 104.

In July 2015, Gateway sued Ms. Metaxas in the Superior Court of San Mateo County, California, “seeking damages it allegedly suffered as a result of the Round-Trip Transaction.” *Id.* ¶ 74. After an eight-day bench trial, the court ruled for Gateway. Mot. at 1. It emphasized that Ms. Metaxas admitted, when pleading guilty, that she had been an integral part of the criminal scheme. Mot. at 6 (quoting Defendants’ RJN, Ex. A, State Court Decision at 11-17); *see also* Defendants’ RJN, Ex. A, State Court Decision at 12 (finding that Metaxas understood the fraudulent nature of the Round-Trip Transaction when she presented it to the Gateway board and intentionally misled the board into believing the Transaction was legitimate). Ms. Metaxas has since moved to vacate the judgment. Mot. at 1 n.4.

B. Procedural Background

The pending motion follows Defendants’ successful motion to dismiss Ms. Metaxas’s

1 original complaint. There, Defendants argued that Ms. Metaxas's claims were (1) barred by the
2 doctrine of collateral estoppel, (2) untimely, and (3) inadequately pled. *See* Order at 5. The Court
3 rejected the first and second of these contentions but agreed with the third, concluding, *inter alia*,
4 that Ms. Metaxas failed to allege a "pattern of racketeering activity" within the meaning of RICO.
5 *Id.* at 17-20.

6 1. Collateral Estoppel

7 Defendants first argued that because Ms. Metaxas previously "pled guilty to conspiring
8 against Gateway and deceiving its Board" she could not later allege "that Defendants committed
9 predicate RICO acts by creating a false pretext for denying her SERP benefits." *Id.* at 7 (internal
10 quotations omitted). But the Court held that her guilty plea did not preclude Ms. Metaxas from
11 alleging, *e.g.*, "that denial of her SERP benefits was premised on fraudulent misrepresentations,"
12 as this contention is "unrelated to her criminal conviction." *Id.* at 7-8. Ms. Metaxas's guilty plea
13 therefore did not bar her RICO claims. *Id.* at 8.

14 2. Statute of Limitations

15 The Court also disagreed that Ms. Metaxas's claims were barred by RICO's four-year
16 statute of limitations. Defendants argued that Ms. Metaxas became aware of her underlying injury
17 (*i.e.*, the denial of SERP benefits) more than four years before she filed her complaint in July 2019
18 because she was entitled to begin receiving benefits shortly after her sixtieth birthday in May
19 2013. *Id.* at 8-9. Ms. Metaxas countered that the limitations period had been "contractually or
20 equitably tolled by a series of tolling agreements between her and Gateway." *Id.* at 9; *see also*
21 FAC Exs. C-G. The Court concluded that these agreements governed only claims that might be
22 brought between Ms. Metaxas and Gateway, not those between her and the bank's officers and
23 directors. *Id.* at 9-10 (citing *Resolution Trust Corp. v. Bonner*, 848 F. Supp. 96, 98-99 (S.D. Tex.
24 1994)). Nevertheless, the Court accepted Ms. Metaxas's alternative argument that her complaint
25 was timely "because she did not know (and had no reason to know) of her injury until the SERP
26 Administrative Committee denied her claims in February 2016." *Id.* at 10. And as the "tolling
27 agreements applied to Ms. Metaxas's claim for SERP benefits," Ms. Metaxas "could not have
28 known that her SERP benefits had been denied until, at the earliest, the tolling agreements

1 expired.” *Id.* Since the last of these agreements did not terminate until July 2015, Ms. Metaxas’s
2 filing of this action in July 2019 was timely on this basis, as well. *Id.*

3 3. Adequacy of Pleading a RICO Claim

4 In response to Defendants’ argument that Ms. Metaxas failed to adequately plead her
5 RICO claims, the Court considered Ms. Metaxas’s allegations of Defendants’ (1) predicate acts,
6 (2) pattern of racketeering activity, and (3) causation—all required elements of a RICO claim
7 under 18 U.S.C. § 1962(c). *See id.* at 11.

8 Ms. Metaxas’s original complaint alleged several categories of predicate acts, including
9 false statements to federal regulators, money-laundering violations, and illegal abstraction of
10 “Gateway’s liability for her SERP benefits.” *See id.*

11 As to the first category, Ms. Metaxas argued that Defendants’ false statements to regulators
12 at the FDIC and OTS/OCC constituted mail and wire fraud under 18 U.S.C. §§ 1341 and 1343.
13 *Id.* at 12. Defendants responded “that these allegations fail[ed] to satisfy Rule 9(b)’s heightened
14 pleading standard for fraud.” *Id.* The Court disagreed, pointing to extensive factual details in
15 what are now ¶¶ 83 ff. of the FAC.² *Id.* at 12-13. Ms. Metaxas therefore “sufficiently allege[d]
16 the who, when, where, and why required by Rule 9(b).” *Id.* at 13. But the Court also held that the
17 complaint did not adequately allege that Defendants’ misleading statements “somehow ‘deprive[d]
18 [the regulatory agencies] of money or property,’” as required by the mail and wire fraud statutes.
19 *Id.* at 13 (quoting *United States v. Miller*, 953 F.3d 1095, 1101 (9th Cir. 2020)). The mail and
20 wire fraud accusations thus failed to constitute predicate acts under RICO.

21 Regarding the last two categories, Defendants did not contest the adequacy of Ms.
22 Metaxas’s allegations that they had illegally abstracted her pension funds in violation of 18 U.S.C.
23 § 664, and the Court held that this predicate was sufficiently pled. *Id.* at 16. “In contrast, the
24 money laundering allegations [were] not well-pled” because Ms. Metaxas failed to explain how
25 certain Gateway financial reports relating to the Round-Trip Transaction “involved proceeds from
26 an unlawful transaction,” as required by 18 U.S.C. §§ 1956 and 1957. *Id.* at 17. The Court thus
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28 ² These were ¶¶ 81-83 of the original complaint; *see* Docket No. 1.

1 concluded that “only the final category of predicate acts, illegal abstraction from a pension plan,”
2 qualified as an underlying offense for RICO purposes. *Id.* at 11.

3 The dispositive portion of the Court’s opinion concerned Ms. Metaxas’s failure to allege a
4 “pattern of racketeering activity” because of two shortcomings in the original complaint. First,
5 such a pattern “‘requires at least two’ predicate acts committed ‘within ten years,’” and Ms.
6 Metaxas “alleged only one predicate act, abstraction from a pension fund.” *Id.* at 17 (quoting 18
7 U.S.C. § 1961(5)). Second, even if her mail and wire fraud allegations had been adequately pled,
8 Ms. Metaxas failed to satisfy the “continuity” requirement of RICO, as she alleged only “a single
9 scheme (to unlawfully deny her retirement benefits) with a single victim (herself).” *Id.* at 18.
10 Specifically, “her allegations of false reports to regulatory agencies and law enforcement” failed to
11 establish open-ended continuity since these “were the inevitable consequence, or at most cover-up,
12 of the completed criminal scheme,” *id.*, and “efforts to conceal a completed criminal scheme do
13 not establish a threat of additional criminal activity in the future,” *id.* at 19. And “despite the fact
14 several years passed between the alleged abstraction of Ms. Metaxas’s SERP benefits and the
15 formal denial of her SERP claim,” “additional factors, such as the number of predicate acts,
16 victims, and injuries” all argued against a finding of closed-ended continuity. *Id.* at 20. Because
17 Ms. Metaxas failed to plead either sufficient predicate acts or continuity of wrongdoing, as
18 required by RICO’s “pattern” element, her claim as a whole failed.

19 The Court concluded its analysis by ruling that Ms. Metaxas “adequately alleged both but-
20 for and proximate causation” in linking Defendants’ predicate acts to her injury. *Id.* at 20. But her
21 additional claim that Defendants violated RICO’s conspiracy provision, 18 U.S.C. § 1962(d), was
22 rejected, as she did not sufficiently plead a substantive violation of the Act under § 1962(c). *Id.* at
23 21-22.

24 The Court therefore dismissed Ms. Metaxas’s original complaint, characterizing her claims
25 as presenting “a single garden-variety fraud,” *id.* at 1, rather than “a continuing criminal
26 conspiracy,” *id.* at 22. Ms. Metaxas was, however, given leave to amend. *Id.* She filed the FAC
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in late June 2020 and Defendants moved to dismiss at the end of July. *See* FAC, Mot.³

III. LEGAL STANDARD

Federal Rule of Civil Procedure 8(a)(2) requires a complaint to include “a short and plain statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). A complaint that fails to meet this standard may be dismissed pursuant to Rule 12(b)(6). *See* Fed. R. Civ. P. 12(b)(6).

To overcome a Rule 12(b)(6) motion to dismiss after the Supreme Court's decisions in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), a plaintiff's “factual allegations [in the complaint] must . . . suggest that the claim has at least a plausible chance of success.” *Levitt v. Yelp! Inc.*, 765 F.3d 1123, 1135 (9th Cir. 2014) (internal quotation omitted). The court “accept[s] factual allegations in the complaint as true and construe[s] the pleadings in the light most favorable to the nonmoving party.” *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008). But “allegations in a complaint . . . may not simply recite the elements of a cause of action [and] must contain sufficient allegations of underlying facts to give fair notice and to enable the opposing party to defend itself effectively.” *Levitt*, 765 F.3d at 1135 (quoting *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011)). “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Iqbal*, 556 U.S. at 678. “The plausibility standard is not akin to a ‘probability requirement,’ but it asks for more than a sheer possibility that a defendant has acted unlawfully.” *Id.* (quoting *Twombly*, 550 U.S. at 556).

Claims for fraud must meet the heightened pleading standard of Federal Rule of Civil Procedure 9(b), which requires a party “alleging fraud or mistake [to] state with particularity the circumstances constituting fraud or mistake.” Fed. R. Civ. P. 9(b). Rule 9(b) “requires . . . an

³ In February 2020, Ms. Metaxas filed another action against Gateway and the SERP Plan in this District, “challenging the same denial of benefits under the Plan that is the grounds for her RICO claims” here. Docket No. 49 at 2; *see* Case No. 20-cv-01184-JD. In the newer case, Ms. Metaxas asserted two causes of action against Defendants and the Plan under ERISA, 29 U.S.C. § 1132(a). *Id.* On June 23, the Court granted Defendants’ motion to relate the ERISA action to the instant case. Docket No. 52.

account of the time, place, and specific content of the false representations as well as the identities of the parties to the misrepresentations.” *Swartz v. KPMG LLP*, 476 F.3d 756, 764 (9th Cir. 2007) (internal quotation marks omitted).

IV. DISCUSSION

In response to the original complaint’s shortcomings, Ms. Metaxas strenuously attempts to characterize Defendants’ denial of Ms. Metaxas’s SERP benefits as but one aspect of an elaborate scheme to defraud federal banking regulators. Ms. Metaxas once again claims violations of RICO under 18 U.S.C. §§ 1962(c) and (d); the FAC alleges new predicate acts of mail and wire fraud (18 U.S.C. §§ 1341 and 1343), bank fraud (18 U.S.C. § 1344), and money laundering (18 U.S.C. §§ 1956 and 1957). *See* FAC ¶ 122. Ms. Metaxas also continues to allege abstraction from a pension or employee benefit fund (18 U.S.C. § 664), which the Court found adequately pled in her original complaint. *See id.*

Defendants offer four arguments for why the FAC should be dismissed. First (and despite the Court’s earlier ruling), Ms. Metaxas’s claims are time-barred by the statute of limitations. Mot. at 2. Second, Ms. Metaxas’s “allegations of the two predicate acts of money laundering and mail and wire fraud are not adequately pled with any specificity” and so fail to satisfy Rule 9(b). *Id.* Third, the FAC fails to “allege the requisite intent to conceal or disguise the nature, source, [or] ownership of SERP funds” in accusing Defendants of money laundering. *Id.* And fourth, Ms. Metaxas again “cannot plead ‘continuity’ of the alleged criminal activity given that the alleged act (the denial of her SERP benefits) is over.” *Id.*

A. Request for Judicial Notice

Both parties request that the Court take notice of numerous documents. Courts may take judicial notice of facts that are “not subject to reasonable dispute” because they (1) are “generally known within the trial court’s territorial jurisdiction,” or (2) “can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.” Fed. R. Evid. 201(b). Matters of public record may be judicially noticed, but disputed facts contained in those records may not. *Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d 988, 999 (9th Cir. 2018).

Defendants request that the Court take notice of nine documents. *See* Docket No. 57-1

(“Defendants’ RJN”) at 1-2. Eight of them relate to the earlier judicial proceedings involving Ms. Metaxas and Gateway. *Id.* at 2-3. Because these documents are public court records, they are properly subject to judicial notice. *See Bennett v. Medtronic, Inc.*, 285 F.3d 801, 803 n.2 (9th Cir. 2002). The Court, however, does not take notice of the truth of the statements contained therein. The ninth document is a redacted copy of the SERP appeals committee’s decision denying Ms. Metaxas’s benefits. Defendants’ RJN at 3, Ex. F. As the FAC necessarily relies on this document and Ms. Metaxas does not contest its authenticity, judicial notice is appropriate for the appeals committee decision as well, although again not necessarily for the truth of any matters asserted therein. *See Lee v. City of Los Angeles*, 250 F.3d 668, 688 (9th Cir. 2001).

Ms. Metaxas requests that the Court take notice of the 2000 Statement of the Financial Accounting Standards Board (“FASB”), which is referenced in her opposition brief. *See* Docket No. 60 (“Plaintiff’s RJN”) at 1; Docket No. 59 (“Opp’n”) at 8-9. Defendants contest the request because, they argue, Ms. Metaxas is asking the Court “to take judicial notice of documents for the truth of their contents and to accept conclusions that Plaintiff seeks to draw from them,” namely that “the FASB sets forth the standard applicable to Defendants and the alleged failure to abide by those standards satisf[ies] the RICO pleading requirements.” Docket No. 62 at 1-2. As with the parties’ other requests, the Court takes notice of the FASB standards, without reaching any conclusion as to the truth or accuracy of the statements therein or their applicability to Defendants.

B. Statute of Limitations

Defendants argue, as they did in their earlier motion to dismiss, that because “RICO claims are subject to a four-year statute of limitations,” Ms. Metaxas’s claims are time-barred. Mot. at 11. They contend that she was (or should have been) aware of her injury when she was denied SERP benefits in 2013, or at least when she filed a counter-complaint seeking payment of those benefits in the Superior Court action in late 2015. *Id.* at 12; *see also* Docket No. 61 (“Reply”) at 2-5. Defendants specifically point to language in Ms. Metaxas’s original complaint suggesting that she “‘had enough information to warrant an investigation which, if reasonably diligent, would have led to discovery of the [alleged] fraud’ in May of 2013.” Reply at 3.

But the Court expressly held in its earlier order that the statute of limitations on Ms.

Metaxas's RICO claims did not begin running "until the SERP Administrative Committee denied her claim [for benefits] in February 2016." Order at 10. As Ms. Metaxas points out, "Defendants made the exact same arguments on their Rule 12(b)(6) motion attacking the original complaint," including by pointing to Ms. Metaxas's cross-complaint in the state court action. Opp'n at 4; Docket No. 22 at 13. In reaching its earlier decision, the Court also had the benefit of supplemental briefing on the effect of the tolling agreements vis-à-vis the statute of limitations. See Opp'n at 4; Order at 4, 9-10. In sum, the motion "cites to no new authority and presents no new facts" to support Defendants' argument. Opp'n at 4. That argument is therefore again rejected.

C. Adequacy of Pleading a RICO Claim

Ms. Metaxas alleges that Defendants have committed RICO violations under 18 U.S.C. § 1962(c)-(d). Section 1962(c) provides:

It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

Section 1962(d) provides: "It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section."

To successfully plead a civil RICO claim under § 1962(c), plaintiffs must plausibly allege that Defendants engaged in "(1) conduct (2) of an enterprise, (3) through a pattern (4) of racketeering activity." *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 (1985). Plaintiffs must also satisfy RICO's statutory standing provisions, which require them to plausibly allege an injury to "business or property" that is proximately caused "by reason of a violation of section 1962." 18 U.S.C. § 1964(c); see also *Diaz v. Gates*, 420 F.3d 897, 900-901 (9th Cir. 2005) (en banc) (discussing the "business or property" and causation requirements of § 1964(c)). Ms. Metaxas and Defendants principally dispute whether she has satisfied the "racketeering activity" (or predicate act) and "pattern" elements of § 1962(c).

1. Predicate Acts

"[R]acketeering activity" is any act indictable under several provisions of Title 18 of the

United States Code,” namely those enumerated at 18 U.S.C. § 1961(1). *Turner v. Cook*, 362 F.3d 1219, 1229 (9th Cir. 2004). The FAC’s allegations of racketeering activity fall into four categories: (1) “alleged false statements to the regulators regarding Gateway’s financial condition,” *i.e.*, mail and wire fraud; (2) “alleged false statements to the Board of Directors . . . regarding Plaintiff’s entitlements to SERP benefits,” *i.e.*, bank fraud; (3) “alleged money laundering by transferring SERP funds into a regular compensation account and paying general compensation expenses with SERP funds; and (4) “illegal abstraction from a pension plan.” Mot. at 13-14. Each of these crimes qualify as valid predicate acts under RICO. *See* 18 U.S.C. § 1961(1).

a. Mail and Wire Fraud

As in her original complaint, Ms. Metaxas alleges that on numerous occasions several defendants “authorized and approved the submission of financial information and statements, including Call Reports, to the FDIC and OTS/OCC falsely omitting GATEWAY’s liability to PLAINTIFF’s SERP PLAN,” and thus committed mail and wire fraud in violation of 18 U.S.C. §§ 1341 and 1343. *See, e.g.*, FAC ¶ 90; *see also id.* Apps. A & B. Sections 1341 and 1343 each prohibit “any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises.” “The mail and wire fraud statutes are identical except for the particular method used to disseminate the fraud, and contain three elements: (A) the formation of a scheme to defraud, (B) the use of the mails or wires in furtherance of that scheme, and (C) the specific intent to defraud.” *Eclectic Props. E., LLC v. Marcus & Millichap Co.*, 751 F.3d 990, 997 (9th Cir. 2014). Additionally, as Supreme Court has recently emphasized, property fraud statutes (including the mail and wire fraud statutes) are “limited in scope to the protection of property rights” and so “prohibit[] only deceptive ‘schemes to deprive [the victim of] money or property.’” *Kelly v. United States*, 140 S. Ct. 1565, 1571 (2020) (quoting *McNally v. United States*, 483 U.S. 350, 360, 356 (1987)).

Defendants’ only objection to the mail and wire fraud allegations is that they fail to satisfy Rule 9(b)’s heightened pleading standard for fraud. *See* Motion at 14. This contention is again identical to that of Defendants’ earlier motion to dismiss, which the Court expressly rejected.

Opp’n at 6; Order at 12. The Court found that Ms. Metaxas alleged with particularity the “specific defendants [who] signed off on false reports,” “the exact months those false reports were submitted,” the locations from which the reports were sent, and the reasons “why the statements were misleading.” *Id.* at 12-13. As Defendants simply “rehash arguments the court had previously rejected,” *O’Connor v. Uber Techs., Inc.*, 58 F. Supp. 3d 989, 996 n.3 (N.D. Cal. 2014), it follows that “Ms. Metaxas sufficiently alleges the who, when, where, and why required by Rule 9(b),” Order at 13.⁴

In its earlier ruling, the Court also found that Ms. Metaxas failed to satisfy the mail/wire fraud requirement that “a defendant must act with the intent . . . to deprive a victim of money or property by means of [his] deceptions.” Order at 13 (quoting *Miller*, 953 F.3d at 1101). The original complaint alleged that Defendants “misled federal regulators as to Gateway’s financial condition” but not that “these false statements somehow ‘deprive[d] [them] of money or property.’” *Id.* (quoting *Miller*, 953 F.3d at 1101). In the FAC, Ms. Metaxas seeks to cure this defect by arguing at length that Defendants’ false statements were made “with the intent to obtain lower FDIC premium charges for GATEWAY than would have been charged by the FDIC had they accurately reported GATEWAY’S core capital by truthfully reflecting the bank’s SERP liability to Plaintiff.”⁵ FAC ¶ 96. Ms. Metaxas alleges that from 2012 to 2018, Defendants’ misstatements to the FDIC saved Gateway “over \$2.5 Million dollars in premiums,” *id.* ¶ 96 (though she does not explain how she arrived at this figure).

Defendants do not appear to dispute that these allegations satisfy the money-or-property requirement of §§ 1341 and 1343. And the FAC offers a wealth of detail describing how, *e.g.*, the

⁴ Defendants contend that Gateway’s statements to federal regulators “were not false as Gateway had no existing liability to Plaintiff’s SERP Plan.” Mot. at 14. They therefore seem to be arguing that there was no “scheme to defraud” or “specific intent to defraud” under §§ 1341 and 1343 because Defendants’ actions were perfectly lawful, a claim that they develop more fully elsewhere in their briefs. *See infra*. But Ms. Metaxas’s allegations that Defendants “falsely report[ed] Gateway’s inflated assets” to regulators “in order to obtain lower premiums and fee charges” sufficiently plead the intent elements of mail and wire fraud, particularly since on a motion to dismiss a plaintiff’s factual allegations are assumed to be true. *See* Opp’n at 7.

⁵ Ms. Metaxas makes a similar claim with respect to the “regulated bank fees” charged by OTS/OCC, which are “based on the regulatory risk that the institution poses,” *e.g.*, “the relationship between the institution’s core capital and its total assets.” *Id.* ¶ 97.

FDIC calculates the insurance premiums it charges banks on a quarterly basis. *See* FAC ¶ 95. Assuming the truth of Ms. Metaxas’s assertions, it seems plausible that Gateway’s claims to have some \$1.24 million in extra capital would reduce the bank’s obligations to the FDIC and OTS/OCC and thus deprived them of money to which they were entitled. Since Defendants fail to contest the sufficiency of Ms. Metaxas’s allegations on this issue, the Court concludes that she has adequately pled the predicate acts of mail and wire fraud.

b. Bank Fraud

The parties devote a good deal of space to Ms. Metaxas’s allegation that Defendants committed bank fraud in violation of 18 U.S.C. § 1344. Section 1344 makes it a crime knowingly “(1) to defraud a financial institution; or (2) to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises.” Ms. Metaxas argues that Defendants violated § 1344—without specifying which subsection—“[b]y misrepresenting to the [Gateway] Board and SERP Administrative Committee the true known facts concerning Plaintiff’s disability and its materiality to her right to accrued SERP benefits.” Opp’n at 12 (citing FAC ¶¶ 98-99); FAC ¶ 123. Defendants thereby “deceived the Bank, putting it at risk of litigation by Plaintiff over her SERP benefit, which risk has now come to pass”; put differently, they “deprived the Bank of an informed decision by its Board and/or SERP Administrative Committee as to the risks involved in denying Plaintiff her right to benefits.” *Id.*

Defendants respond by arguing, *inter alia*, that Ms. Metaxas’s allegations “are contradicted by [her] guilty plea and therefore barred by the doctrine of collateral estoppel,” Mot. at 15, and that “only a financial institution [has] standing” to “allege bank fraud as a predicate act for RICO purposes,” *id.* at 16.⁶

These issues are largely beside the point, however, as Ms. Metaxas has failed to show how Defendants’ purported scheme to commit bank fraud deprived Gateway of any property interest. As described above, she alleges that Defendants “deceived the Bank” by lying about Ms.

⁶ On Defendants’ arguments about Ms. Metaxas’s lack of statutory standing to allege certain predicate acts, see *infra*.

Metaxas's disability (and therefore her eligibility for SERP benefits). But she claims only that this deception put Gateway at a heightened risk of eventual litigation with Ms. Metaxas or, alternatively, that it "deprived the Bank of an informed decision" as to this litigation risk. As Defendants point out, "such an informed decision . . . is obviously not property under custody or control of" Gateway. Reply at 6-7. Ms. Metaxas's allegations therefore fail to satisfy the plain terms of § 1344(2). And it likewise fails to satisfy § 1344(1), as that provision also requires a scheme "to obtain property belonging to [a] bank." *See Shaw v. United States*, 137 S. Ct. 462, 469 (2016); *see also Kelly*, 140 S. Ct. at 1571 (reiterating that property fraud statutes apply only to "schemes to deprive [the victim of] money or property"). Ms. Metaxas does not allege as much in the FAC, nor does she cite any authority for the principle that undermining a bank's ability to make an "informed decision" creates liability under § 1344. And "because the abstracted funds were allegedly used by Gateway itself" as part of Defendants' broader scheme, Reply at 8, it is particularly unclear how the bank was deprived of money or property.

Ms. Metaxas's bank fraud claim therefore cannot serve as a predicate act under RICO.

c. Money Laundering

The parties also dispute whether Ms. Metaxas has adequately alleged money laundering offenses under 18 U.S.C. §§ 1956 and 1957. The gravamen of Ms. Metaxas's claim is that "Defendants knew that the [SERP] funds were proceeds of an unlawful abstraction yet used the abstracted funds to pay regular compensation expenses to disguise the nature or source of those funds." Opp'n at 17 (citing FAC ¶¶ 122-23).

To plead a violation of § 1956, a plaintiff must allege that the defendant "(1) engaged in a financial transaction which involved proceeds from specified illegal activity, (2) knew the proceeds were from illegal activity, and (3) intended the transaction either to promote the illegal activity or to conceal the nature, source, or ownership of the illegal proceeds." *United States v. Marbella*, 73 F.3d 1508, 1514 (9th Cir. 1996). Section 1957, in contrast, requires a plaintiff to show that "(1) the defendant knowingly engaged in a monetary transaction; (2) he knew the transaction involved criminal property; (3) the property's value exceeded \$10,000; and (4) the property was derived from a specified unlawful activity." *United States v. Rogers*, 321 F.3d 1226,

1 1229 (9th Cir. 2003).

2 Beyond paraphrasing the language of §§ 1956 and 1957, the only factual allegation of
3 money laundering that Ms. Metaxas adduces comes from ¶ 123(b)(2) of her complaint: “Sometime
4 in March or April of 2010, Defendant Green transferred funds held in GATEWAY’S SERP
5 account representing reserves for pension fund liabilities on Plaintiff’s SERP PLAN to
6 GATEWAY’s Compensation account, and thereafter used the proceeds from the abstraction of the
7 SERP funds to pay regular compensation expenses of GATEWAY” *See* Opp’n at 16-17.

8 Defendants focus, *inter alia*, on the heightened pleading requirements for money-
9 laundering claims under Rule 9(b), Mot. at 17, and Ms. Metaxas questions the applicability of
10 Rule 9(b) to such claims, Opp’n at 15-16. Defendants’ essential point, though, is that the FAC has
11 not adequately alleged “that Defendants knew the proceeds/transactions involved illegal
12 activities.” Reply at 10. Regarding § 1956, they argue that Ms. Metaxas fails to explain “how the
13 transfer or use of the SERP funds was intended . . . [to] disguise the nature of the proceeds of the
14 abstraction.” Mot. at 17-18. They further argue that while § 1957 lacks the intent-to-conceal
15 requirement of § 1956, Ms. Metaxas’s mere allegation “that Defendants made a transfer to
16 Gateway’s compensation account from which Gateway’s employees were paid” does not indicate
17 any knowledge of the transfer’s illegality. Reply at 10-11; Opp’n at 18 (citing FAC ¶ 80).

18 Assuming that the FAC “sufficiently alleges the who, when, where, and why required by
19 Rule 9(b),” Order at 13, Ms. Metaxas nevertheless fails to allege facts showing *how* Defendants
20 used “the abstracted funds to pay regular compensation expenses” in such a way that they
21 “disguise[d] the nature or source of those funds.” *See* Opp’n at 17. Defendants contend that there
22 was no segregated account for the SERP benefits, as they would have been paid out of the bank’s
23 general funds. *See infra*; *see also* Mot. at 18-19 (arguing that Metaxas “alleges nothing more than
24 that the general asset funds that could have been used to pay her SERP benefits were instead used
25 for payroll,” and that this lawful activity cannot form the basis of money laundering allegations).
26 “[W]here a defendant takes no steps to disguise or conceal the source or destination of [allegedly
27 laundered] funds, leaving an easy-to-follow trail in moving money around,” the “transactions
28 conspicuously lack the convoluted character associated with money laundering.” *United States v.*

1 *Wilkes*, 662 F.3d 524, 545 (9th Cir. 2011) (internal quotations omitted); *see also United States v.*
 2 *Adefehinti*, 510 F.3d 319, 322 (D.C. Cir. 2007) (“The money laundering statute criminalizes
 3 behavior that masks the relationship between an individual and his illegally obtained proceeds; it
 4 has no application to the transparent division or deposit of those proceeds.”); *Mocha Mill, Inc. v.*
 5 *Port of Mokha, Inc.*, No. 18-cv-02539-HSG, 2019 WL 1048252, at *10 (N.D. Cal. Mar. 5, 2019)
 6 (rejecting theory “that by committing fraud in the past, Defendants acquired criminal proceeds”
 7 and “because every transaction [of Defendants’ company] is infected by the past fraud, each such
 8 transaction constitutes money laundering.”).

9 Ms. Metaxas thus fails to show that Defendants engaged in the predicate act of money
 10 laundering under § 1956. Her related claim under § 1957 presents a closer question. The
 11 conclusory nature of her allegations (*i.e.*, that “Defendants knew that the [SERP] funds were
 12 proceeds of an unlawful abstraction,” Opp’n at 17) and the fact that the allegations are dependent
 13 on her questionable abstraction claim, *see infra*, raise serious doubts over whether the § 1957
 14 claim is adequately pled. As the Court ultimately resolves this motion on other grounds, however,
 15 it assumes, *arguendo*, that Ms. Metaxas has sufficiently alleged a violation of § 1957 as a RICO
 16 predicate act.

17 d. Abstraction

18 As in her original complaint, Ms. Metaxas argues that Defendants Green, Fentriss, and
 19 Wang “intentionally interfered with [her] right to receive benefits under the SERP and falsely
 20 eliminated GATEWAY’s SERP PLAN liability of \$1,236,448.04 as of March 31, 2010, thereby
 21 committing a violation of 18 U.S.C. § 664.” FAC ¶ 78. Under § 664, “[a]ny person who . . .
 22 willfully abstracts or converts to his own use or to the use of another, any of the moneys, funds,
 23 securities, premiums, credits, property, or other assets of any . . . employee pension benefit plan”
 24 is liable for abstraction.

25 In its earlier order, the Court found that Ms. Metaxas had adequately alleged a violation of
 26 § 664, Order at 16, and the FAC appears to include additional details supporting her claim. Ms.
 27 Metaxas also points out that “the Court had the SERP Plan before it as an exhibit to the original
 28 complaint,” and that Defendants cited to their primary authority on this issue, *Hill v. Opus Corp.*,

841 F. Supp. 2d 1070 (C.D. Cal. 2011), in their earlier motion to dismiss (though for different purposes). Opp’n at 18; Docket 22 at 25. Ms. Metaxas’s argument that Defendants’ challenge to the adequacy of her abstraction allegations “is yet another attempt to seek reconsideration of the Court’s prior rulings” therefore carries some weight. *Id.*

At the same time, the earlier order noted that Defendants did not challenge the adequacy of the abstraction allegations in their first motion to dismiss. Order at 16. Here, they do. Citing specific language in Ms. Metaxas’s SERP agreement with Gateway, FAC Ex. A § 10.1, Defendants argue that the SERP “is an *unfunded* top hat plan.” Mot. at 19 (emphasis in original). Payment under such a plan comes “only from the company’s general assets,” and plan participants “have no secured interest in any of the monies in the plan” and no “cognizable property interest” in those monies. *Id.* (quoting *Hill*, 841 F. Supp. 2d at 1090-91, 1093); *see also id.* (quoting additional SERP language stating that “all of [Gateway’s] assets and policies shall be, and remain, the general, unpledged, unrestricted assets of [Gateway]”). Ms. Metaxas thus fails to plead abstraction, Defendants argue, because “she alleges nothing more than that the general asset funds that could have been used to pay her SERP benefits were instead used for” other legitimate purposes. *Id.*

Ms. Metaxas counters that the allegedly abstracted SERP funds were not part of the bank’s general assets but were “segregated” in a separate account before “Defendants . . . transferred [them] to the compensation [expense] account.” Opp’n at 20 (citing FAC ¶ 80). Additionally, Ms. Metaxas argues that the SERP differs from the top hat plan in *Hill* in important ways. For example, whereas “the contributions to the [*Hill*] plan were to come from the employer,” here “the SERP was funded from [Metaxas’s] compensation” and a life insurance policy purchased specifically for that purpose. *Id.* at 19 (citing FAC ¶¶ 45-46). Ms. Metaxas also cites to *United States v. Grizzle*, 933 F.2d 943 (11th Cir. 1991), which held that contributions “directly taken from the property of . . . individual employees,” *i.e.*, from wages to which they were entitled, “could serve as the basis of an embezzlement conviction under 18 U.S.C. § 664.” Opp’n at 19-20; *see also Hill*, 841 F. Supp. 2d at 1094 (distinguishing *Grizzle*, 933 F.2d at 946). Lastly, Ms. Metaxas argues that even if she lacked a cognizable property interest in the retirement funds themselves,

1 the SERP still “constituted a contract between [her] and Gateway” such that Defendants’
 2 abstraction “interfered with her contract for SERP benefits.” Opp’n at 20. And because the
 3 “Ninth Circuit recognizes interference with contract as . . . an injury to a ‘property’ interest under
 4 RICO,” the FAC “properly alleges abstraction of the SERP liability as a predicate act.” *Id.* at 21
 5 (citing *Diaz*, 420 F.3d at 902).

6 While the issue is a close one, the Court again assumes, *arguendo*, that Ms. Metaxas has
 7 made out a plausible claim at the pleading stage. To be sure, Defendants quote language in the
 8 SERP suggesting that it is indeed a top hat plan: it was “intended to be an unfunded plan” whose
 9 beneficiaries would have “no legal or equitable rights, claims or interests” in Gateway’s general
 10 assets. Mot. at 19 (quoting FAC Ex. A §§ 10.1-10.2). Defendants also point to *Hill*’s holding that
 11 participants in such a plan have no cognizable property interest that would allow them to state a
 12 claim under RICO. *See* 841 F. Supp. 2d at 1089-95. And they note that courts “are not required
 13 to accept as true conclusory allegations which are contradicted by documents referred to in the
 14 complaint.” *See* Reply at 12; *see also, e.g., Wright v. Or. Metallurgical Corp.*, 360 F.3d 1090,
 15 1096 (9th Cir. 2004) (quoted above). Nevertheless, Ms. Metaxas’s factual allegations and her
 16 recitation of out-of-circuit authority create some uncertainty about the mechanics of the SERP,⁷
 17 and so the Court will assume, *arguendo*, that she states a plausible claim of abstraction as a
 18 predicate act under RICO.

19 D. Pattern of Racketeering Activity

20 Assuming Ms. Metaxas has stated a plausible claim of two predicate acts, the question
 21 remains whether Ms. Metaxas has adequately alleged a “pattern” of racketeering activity, as
 22 mandated by 18 U.S.C. § 1962(c). The pattern element requires, as a threshold matter, that there
 23 “be at least two acts of racketeering activity within ten years of one another.” *Id.*; *see also* 18
 24 U.S.C. § 1961(5). “A ‘pattern’ of racketeering activity also requires proof [1] that the racketeering
 25 predicates are related and [2] ‘that they amount to or pose a threat of continued criminal activity.’”

26
 27 ⁷ For example, there is some question about whether the plan was funded or not given Ms.
 28 Metaxas’s allegation that “the SERP was funded from [her] compensation.” Opp’n at 19; *see also*
Hill, 841 F. Supp. 2d at 1094 (distinguishing cases where benefit plans were “funded” from those
 that had merely “vested”).

1 *Turner*, 362 F.3d at 1229 (quoting *H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 239 (1989)).

2 Predicate acts are related if they have “the same or similar purposes, results, participants, victims,
3 or methods of commission, or otherwise are interrelated by distinguishing characteristics and are
4 not isolated events.” *H.J. Inc.*, 492 U.S. at 240. The parties do not dispute that the predicate acts
5 alleged by Ms. Metaxas are related within the meaning of RICO.

6 As the Ninth Circuit explains, the continuity requirement aims “at eliminating RICO
7 actions against perpetrators of isolated or sporadic acts.” *Sun Sav. and Loan Ass’n v. Dierdorff*,
8 825 F.2d 187, 193 (9th Cir. 1987). The essential question in determining whether the continuity
9 requirement is met is “whether the [predicate] acts pose[] a threat of continuing activity.” *Id.* at
10 194. Continuity has been interpreted as encompassing “both a closed- and open-ended concept,”
11 *H.J. Inc.*, 492 U.S. at 241, and a plaintiff can satisfy the requirement “either by pleading ‘closed-
12 ended continuity’ or by pleading ‘open-ended continuity,’” *Allwaste, Inc. v. Hecht*, 65 F.3d 1523,
13 1526 (9th Cir. 1995). Closed-ended continuity entails “a series of related predicates extending
14 over a substantial period of time,” *i.e.*, more than “a few weeks or months.” *H.J. Inc.*, 492 U.S. at
15 241. Open-ended continuity involves “past conduct that by its nature projects into the future with
16 a threat of repetition.” *Id.* Courts analyze both closed-ended and open-ended continuity on a fact-
17 specific basis. *See id.* at 242 (“Whether the predicates proved establish a threat of continued
18 racketeering activity depends on the specific facts of each case.”) While duration is an important
19 factor in determining whether closed-ended continuity is satisfied, the Ninth Circuit has described
20 the “substantial period of time” requirement as a “flexible concept” and declined to adopt bright-
21 line rules based on the temporal length of a scheme. *See Allwaste*, 65 F.3d at 1528. Courts also
22 consider additional factors, such as the number of predicate acts, victims, and injuries, to assess
23 whether the plaintiff has demonstrated closed-ended continuity. *See Midwest Grinding Co. v.*
24 *Spitz*, 976 F.2d 1016, 1023-24 (7th Cir. 1992). Thus, when a plaintiff alleges only a single scheme
25 with a single victim it cuts against a finding of both closed-ended as well as open-ended
26 continuity. *See Religious Tech. Ctr. v. Wollersheim*, 971 F.2d 364, 365-67 (9th Cir. 1992).
27 Particularly in the context of open-ended continuity, a criminal scheme with a singular goal poses
28 no threat of continuing criminal activity once that goal is achieved. *Id.*

In its prior order, the Court ruled that Ms. Metaxas had failed to satisfy the predicate act requirement in her original complaint because she “successfully alleged only one predicate act, abstraction from a pension fund.” Order at 17. Defendants argue here that the FAC has not meaningfully changed Ms. Metaxas’s theory of the case, which the Court previously described as “a single scheme (to unlawfully deny her retirement benefits) with a single victim (herself).” *Id.* at 18. Notably, the Court’s continuity analysis assumed, *arguendo*, that Ms. Metaxas *had* adequately pled predicate acts of mail and wire fraud in addition to abstraction. *Id.* at 17. It nevertheless concluded that she “ha[d] not demonstrated continuity” because Defendants’ false statements to regulators were “the inevitable consequence, or at most cover-up, of the completed criminal scheme.” *Id.* at 17-18. While Ms. Metaxas has amended her mail and wire fraud claims by identifying the regulatory agencies, rather than Ms. Metaxas herself, as the principal victim of Defendants’ misrepresentations,⁸ Defendants contend that the regulators remain “merely inevitable players” in a circumscribed scheme ultimately focusing on Ms. Metaxas and her SERP benefits. Mot. at 21; *see also* Reply at 12-14.

Ms. Metaxas responds that the FAC sufficiently pleads additional predicate acts related to her successful abstraction claim, and that the FAC alleges both open-ended and closed-ended continuity. It establishes open-ended continuity, she argues, because Defendants’ “false quarterly reports omitting the SERP liability” to the FDIC and OTS/OCC “continue to be made to this day.” Opp’n at 24. The FAC pleads closed-ended continuity because it alleges “dozens of related predicate acts, multiple victims, and multiple injuries arising from a scheme extending from 2010 to the present day.”⁹ *Id.*

⁸ *See, e.g.*, FAC ¶ 12: “From learning these facts Plaintiff was first put on notice that: (a) since 2010 Defendants had been making false statements about GATEWAY’s financial condition and capital to the FDIC and OTS/OCC; (b) Defendants were doing so with the intent to defraud the FDIC and regulatory agencies into charging GATEWAY lower deposit insurance premiums and lower regulatory fees, and that denying GATEWAY’s SERP liability to Plaintiff was integral to, and necessitated by, Defendants [*sic*] ongoing practice of misrepresenting the bank’s financial condition to federal regulators.”

⁹ Specifically, given that the “mailing/wiring of false and misleading information to the FDIC and the OCC/OTS induced lower charges to Gateway on a quarterly basis (for the FDIC) and a bi-annual basis (for OTS/OCC), each new instance of a lowered charge to Gateway based on the false reporting constituted a separate and distinct predicate act—a new, distinct fraud on the

The Court concludes that the fundamental character of Ms. Metaxas's claims has not changed since the Court dismissed her original complaint. Even though the FAC seeks to recharacterize the regulators as the primary targets of Defendants' scheme, it remains the case that without the targeted abstraction of Ms. Metaxas's SERP benefits none of the other predicate acts would have occurred (at least not in the manner alleged). Notably, in the section of her opposition brief arguing that the FAC has satisfied RICO's pattern requirement, Ms. Metaxas offers the following account:

Plaintiff has alleged an ongoing scheme to operate Gateway as a racketeering enterprise. One of the predicate acts was the April 2010 abstraction by Defendants Green, Wang, and Fentriss of the funds identified by Gateway as funding its SERP liability (18 U.S.C. § 664). Then, in violation of 18 U.S.C. 1956 and 1957 [*sic*], the same defendants plus Defendant Cheung transferred *the funds freed up by the abstraction of the SERP liability* to the Bank's compensation account and obscured the provenance of the funds by using them to pay general compensation expenses.

All six defendants were responsible for acts of mail and wire fraud (18 U.S.C. §§ 1341, 1343) consisting of the filing by Gateway every quarter of false and misleading financial reports calculated to deceive the FDIC and OTS/OCC into charging Gateway lower insurance premiums and regulatory fees due to the inflated core assets *resulting from the omission of the SERP liability*. As these violations occurred on a quarterly basis, each Defendant is chargeable for the number of false and misleading filings over the number of quarters they were an officer and director of Gateway.

Finally, the FAC alleges two acts constituting bank fraud under 18 U.S.C. § 1344. These occurred in February of 2016 and were committed by Defendants Keefe and Lee.

Opp'n at 24 (emphasis added). As Ms. Metaxas explains Defendants' scheme, the denial of her retirement benefits continues to supply the means for, and constitutes the but for cause of, Defendants' other acts. The additional instances of racketeering activity that Defendants purportedly committed are ancillary to what remains "a single scheme with a single victim," as the Court previously held. Order at 17 (citing *Religious Tech. Ctr.*, 971 F.2d at 365-67).¹⁰

targets." *Id.*

¹⁰ To be sure, the FAC contains scattered references to other instances of Defendants' wrongdoing, including two other transactions that it accuses Defendants of misreporting in financial reports, such as the misreporting of the Round-Trip Transaction. See FAC ¶¶ 7(a) and (c); ¶¶ 86-87. But the FAC fails to offer a coherent explanation of how these transactions relate to Defendants'

In particular, while the FAC’s allegations of mail and wire fraud are more detailed than those in Ms. Metaxas’s original complaint, Defendants’ false reports to regulators continue to be—even in Ms. Metaxas’s own account—“the inevitable consequence, or at most cover-up,” *id.* at 18, of the scheme to deprive Ms. Metaxas of her SERP benefits. This conclusion is underscored by the highly contingent nature of Ms. Metaxas’s mail and wire fraud allegations, which, in order to succeed on the merits, would require a finding that Defendants *did* in fact wrongfully abstract her retirement benefits. Put another way, if Defendants were not actually liable to Ms. Metaxas under the SERP when they appropriated the retirement funds, then they did not commit fraud in reporting those funds as general assets in subsequent reports to the regulatory agencies. Moreover, any fraud in reporting would cease upon resolution of the SERP benefits dispute: if Defendants are eventually judged liable to Ms. Metaxas for the SERP payments, *e.g.*, in the related ERISA action, then Defendants’ fraudulent reporting will presumably cease, with Ms. Metaxas receiving her previously withheld benefits. If Defendants were to prevail on the merits of the ERISA action there would be no fraud or abstraction.¹¹

Defendants’ conduct does not “amount to or pose a threat of continued criminal activity.” *Turner*, 362 F.3d at 1229 (quoting *H.J. Inc.*, 492 U.S. at 239); *see also Concorde Equity II, LLC v. Miller*, 732 F. Supp. 2d 990, 999 (N.D. Cal. 2010) (“[T]he fact that Defendants continue to reap the benefits of their alleged illegal activity and/or that . . . [Plaintiff] continues to suffer the effects thereof, is of no import to the Court’s ‘continuity’ determination.”). It does not establish open-ended continuity because, for the reasons just given, it does not “project[] into the future with a

purported abstraction of Ms. Metaxas’s SERP benefits or to the Round-Trip Transaction itself. (It is not clear, for example, how Defendants managed, in Ms. Metaxas’s telling, to defraud their biggest customer out of more than \$5.6 million through a bogus loan for \$3.8 million.) More importantly, Ms. Metaxas does not refer to these additional predicate acts of mail and wire fraud anywhere in her opposition brief, which is focused almost exclusively on the SERP abstraction and acts flowing from it.

¹¹ At the hearing on the motion to dismiss, counsel for Ms. Metaxas argued that even if the abstraction were ultimately judged lawful, Defendants’ alleged violation of Generally Accepted Accounting Principles in removing the potential liability to Ms. Metaxas from its books amounts to a predicate act of mail/wire fraud. Ms. Metaxas also raised this argument—for the first time—in her opposition brief; *see* Opp’n at 8-9. As Defendants correctly observe, this argument was not pled in the FAC, Reply at 5, and so the Court declines to consider it in deciding this motion.

1 threat of repetition.” *H.J. Inc.*, 492 U.S. at 241. It also does not establish closed-ended continuity
 2 because Defendants’ scheme targeted only one victim, Ms. Metaxas herself, with the regulatory
 3 agencies at most the merely incidental victims of the scheme. *See Midwest Grinding Co.* 976 F.2d
 4 at 1023-24. And while the number of Defendants’ alleged predicate acts has been increased by the
 5 FAC, all of the purported acts were a part of, and dependent upon, the core act of extracting her
 6 SERP benefits. In general, it is difficult to discern a “pattern” of criminal activity where the
 7 alleged conduct derives from a single wrong directed at a single victim. The case at bar contrasts
 8 with paradigmatic RICO cases involving multiple acts against multiple victims. *See, e.g., H.J.*
 9 *Inc.*, 492 U.S. at 249-50 (holding that various plaintiff-victims alleged a pattern of racketeering
 10 activity against defendants who paid and received “numerous bribes, in several different forms,”
 11 “over at least a 6-year period”); *Allwaste*, 65 F.3d at 1529 (ruling that pattern requirement was
 12 satisfied where defendants demanded kickbacks from four victims and where “there [was] nothing
 13 to suggest that they would have ceased” because the scheme was “not connected to the
 14 consummation of any particular transaction”).

15 In its previous order, the Court properly analogized this case to the Eleventh Circuit’s
 16 decision in *Aldridge v. Lily-Tulip, Inc. Salary Retirement Plan Benefits Committee*, refusing to
 17 find continuity. *See* Order at 18-19 (discussing *Aldridge*, 953 F.2d 587 (11th Cir. 1992)). Its
 18 conclusion here is also consistent with caselaw from the Ninth Circuit and this District. In
 19 *Medallion Television Enterprises, Inc. v. SelecTV of California, Inc.*, the plaintiff brought RICO
 20 claims against a joint venturer after their agreement to broadcast a boxing match fell through; the
 21 plaintiff alleged that the defendant committed several acts of, *inter alia*, mail and wire fraud by
 22 misrepresenting the number of commitments it had received from television stations to air the
 23 match, and so had engaged in a pattern of racketeering activity. 833 F.2d 1360, 1361-62 (9th Cir.
 24 1987). Although the Ninth Circuit recognized that the plaintiff had adequately alleged more than
 25 two predicate acts, *id.* at 1362, it held that continuity was absent because the defendant’s
 26 misrepresentations were merely “parts of its single effort to induce [the plaintiff] to form the joint
 27 venture,” *id.* at 1364. Since the case ultimately “involved but a single alleged fraud with a single
 28 victim,” there was no threat of continuing criminal activity. *Id.* at 1363; *see also Sever v. Alaska*

Pulp Corp., 978 F.2d 1529, 1535-36 (9th Cir. 1992) (denying continuity where plaintiff alleged numerous predicate acts but defendant's conduct amounted to "a single episode having the singular purpose of impoverishing [the plaintiff]"); *cf. Sun Sav. and Loan Ass'n*, 825 F.2d at 192-94 (finding continuity where defendant committed predicate acts of mail fraud "because they covered up a whole series of alleged kickbacks and receipts of favors, occurred over several months, and in no way completed the criminal scheme").

Likewise, in *Royce International Broadcasting Corp. v. Field*, this court held that the plaintiff failed to plead continuity where it alleged that the defendant committed several acts of mail and wire fraud to mislead it into selling a radio station. No. 99-cv-04169, 2000 WL 236434, at *1-2 (N.D. Cal. Feb. 23, 2000). The court noted that the plaintiff's allegations "may state a claim for fraudulent inducement to enter a single contract," but could not establish a "pattern of racketeering activity." *Id.* at *3. Such contract and fraud claims, the court concluded, "are not the types of activities that RICO was intended to eliminate" and a contrary ruling would "permit[] all allegations of broken promises in failed business transactions to constitute racketeering activity." *Id.* at *4 (internal quotations omitted).

As noted in the Court's previous order, if Defendants' efforts to conceal their original abstraction could be parlayed by Ms. Metaxas into creating RICO liability, then "every transaction could turn into a 'multiple scheme'" and "every run-of-the-mill fraud case that belongs in state court" would be transformed into a federal claim. Order at 19 (quoting, *e.g., Midwest Grinding Co. v. Spitz*, 976 F.2d 1016, 1025 (7th Cir. 1992)). Having previously "decline[d] to adopt such an expansive interpretation of civil RICO," *id.*, the Court does so again here.

As Ms. Metaxas has failed to show that Defendants' conduct threatens continued criminal activity, the Court holds that she has failed to state a RICO claim under § 1962(c). It therefore **GRANTS** Defendants' motion as to this claim.

E. Causation

Defendants argue in their reply brief that Ms. Metaxas fails to satisfy RICO's causation element under § 1964(c). The Supreme Court has held that a civil RICO plaintiff must "show that a RICO predicate offense not only was a 'but for' cause of his injury, but was the proximate cause

as well.” *Hemi Grp., LLC v. City of New York*, 559 U.S. 1, 9 (2010) (internal quotation omitted). Proximate causation requires that there be “a direct relationship between the injury asserted and the injurious conduct alleged.” *Imagineering, Inc. v. Kiewit Pac. Co.*, 976 F.2d 1303, 1311 (9th Cir. 1992) (citing *Holmes v. Sec. Inv’r Prot. Corp.*, 503 U.S. 258, 268 (1992)). Defendants assert that the FAC does not connect Ms. Metaxas’s injuries to the predicate acts of mail/wire fraud and money laundering. Reply at 14.

In its prior order, the Court found that Ms. Metaxas had “adequately alleged both but-for and proximate causation.” Order at 20. It based this finding on her abstraction claim, as “[i]t is hard to see how the abstraction of Ms. Metaxas’s SERP benefits did not lead directly to the loss of those benefits.” *Id.* at 20-21. And while the other predicate acts she alleged bore “a less obvious connection” to her injury, the Court reasoned that RICO plaintiffs “are not required to show that each individual predicate act caused them an injury, but rather that the pattern of racketeering activity did.” *Id.* at 21 (quoting *Just Film, Inc. v. Merchant Servs., Inc.*, No. 10-cv-01993-CW, 2012 WL 6087210, at *12 (N.D. Cal. Dec. 6, 2012)).

The Court notes that there is some debate whether courts should evaluate causation by reference to the pattern of alleged racketeering activity as a whole or to each individual predicate act. Compare *Just Film, Inc.*, 2012 WL 6087210, at *12 (citing cases from the Seventh and Eighth Circuits for the principle that plaintiffs need not “plead or prove that they were harmed by each predicate act alleged”) with *Hill*, 841 F. Supp. 2d at 1097-1102 (analyzing plaintiffs’ bank fraud allegations separately from their mail/wire fraud and embezzlement allegations).

The Court need not decide this issue given Ms. Metaxas’s failure to otherwise plead a viable RICO claim.

F. Conspiracy

To state a claim for RICO conspiracy under § 1962(d), plaintiffs must sufficiently allege a substantive violation of the Act under subsections (a), (b), or (c). See, e.g., *Sanford v. MemberWorks, Inc.*, 625 F.3d 550, 559 (9th Cir. 2010) (“Plaintiffs cannot claim that a conspiracy to violate RICO existed if they do not adequately plead a substantive violation of RICO.”).

Because Ms. Metaxas has failed to adequately plead a substantive violation of RICO under

§ 1962(c), the Court **GRANTS** Defendants' motion to dismiss her conspiracy claim under § 1962(d), as well.

G. Leave to Amend

If a court dismisses a complaint for failure to state a claim, it should “freely give leave [to amend] when justice so requires.” Fed. R. Civ. P. 15(a)(2). A court nevertheless has discretion to deny leave to amend based on “undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, [and] futility of amendment.” *Leadsinger, Inc. v. BMG Music Pub.*, 512 F.3d 522, 532 (9th Cir. 2008) (citing *Foman v. Davis*, 371 U.S. 178, 182 (1962)).

Ms. Metaxas requests that the Court grant her leave to amend if it finds that the FAC fails to state a claim for relief. Opp'n at 3 n.1. But the Court has already provided Ms. Metaxas with an opportunity to amend. It will not do so again, particularly given what the Court previously indicated in its earlier order—that this case entails only “a single garden-variety fraud or a violation of [ERISA]” and that Ms. Metaxas would be better served “suing for breach of contract or denial of ERISA benefits.” Ms. Metaxas has, in fact, pursued an ERISA claim in the related action now before the Court. *See Concorde Equity II, LLC*, 732 F. Supp. 2d at 999 (denying leave to amend where plaintiff “had previously filed an amended complaint”).

V. CONCLUSION

For the reasons given above, the Court **GRANTS** Defendants' motion to dismiss the claims asserted in Ms. Metaxas's FAC with prejudice. The Clerk is instructed to enter judgment and close the file.

This order disposes of Docket No. 57.

IT IS SO ORDERED.

Dated: November 30, 2020



EDWARD M. CHEN
United States District Judge